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No. 81-2266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROY WARNER, ET AL.,
CLEVELAND POLICE OFFICERS,

Cross-Petitioners,

-v-

SOVEREIGN NEWS COMPANY,

Cross-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

BRUCE A. TAYLOR
2331 W. Royal Palm Road, #105
Phoenix, Arizona 85021
(602) 995-2600

Attorney for Cross-Petitioners

QUESTIONS PRESENTED

I. Whether the pendency of a state court search warrant proceeding required abstention under Younger from federal claims of unconstitutionality of state statutes, invalidity of state search warrant, and unreasonable search under state search warrant unless claimant presented these questions first to state court which issued the search warrant.

II. Whether pendency of appeal in state supreme court of the intermediate state appellate court decision upon which federal district court relied in finding state statute unconstitutional required abstention under Pullman until state supreme court considered or construed that state statute.

PARTIES

The Cross-Petitioners are the following members of the Cleveland Police Department who were named as defendants in the Complaint filed in District Court on March 7, 1977 and were Appellants in the Court of Appeals.

The cross-petitioning officers are: "Roy Warner, L. Thompson, John Crawford, Archie Catavalos, Kenneth White, William Poe, Richard B. Millett, John H. Devine, James Lynsky, Vicent G. Krawulski, Carl Delau, Andrew S. Vanyo, James Kennelley, Robert J. Cermak, Henry Yisha, Gregory Kunz, B. Jones, Richard McIntosh, John McNamara, Edward C. Lucas, Samuel Hennie, Charles Berkey, Robert O'Brien, and members Kaminski, Banyon and McGreer #1538".

John T. Corrigan, Prosecuting Attorney for Cuyahoga County, Ohio, is a defendant and was named as a respondent

in the Plaintiff's Petition for Certiorari. In addition, William J. Brown, Attorney General of Ohio appeared as amicus curiae in the court below. John T. Corrigan and Lee C. Falke, Prosecuting Attorney for Montgomery County, Ohio, and Dayton, Ohio, police officers E. R. Robinson and C. L. Dalrymple were parties defendant in the District Court but were not parties to the appeal in the court below which resulted in the judgment now sought to be reviewed. The only Appellants below were the Cleveland Police Officers.

Sovereign News Company is the plaintiff in this action, is the Petitioner for a Writ of Certiorari, filed June 21, 1982, and is the Cross-Respondent to this Cross-Petition of the Cleveland Police Officers.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioners, Roy Warner, et al., Cleveland Police Officers, pray that if a Writ of Certiorari be issued to review the judgment and order, entered on February 4, 1982, by the United States Court of Appeals for the Sixth Circuit,

that the Cross-Petition be granted also to review the abstention issues central to the beginning and progress of the action.

OPINIONS BELOW

The opinions delivered in the courts below are set out in the separately printed Appendix to the Petition for a Writ of Certiorari filed by the Sovereign News Company on June 21, 1982, Case No. 81-2326. For convenience, Cross-Petitioners will rely upon and refer to that Appendix.

The second opinion of the United States Court of Appeals for the Sixth Circuit in this case, reported at 674 F.2d 484 (6th Cir. 1982), is set forth in the Appendix at pp. A1-A5. The second opinion of the District Court in this case, unreported, is set forth in the Appendix at pp. A6-A90, referred to as "Sovereign II" by the courts below. The

first opinion of the United States Court of Appeals for the Sixth Circuit in this case, reported at 610 F.2d 428 (6th Cir. 1979), is set forth in the Appendix at pp. A93-A96. The first opinion of the District Court in this case is reported at 448 F.Supp. 306 (N.D. Ohio 1977), referred to as "Sovereign I" by the courts below. The opinion and judgment of the Sixth Circuit in Turoso, et al. v. Cleveland Municipal Court, et al., reported at 674 F.2d 486 (6th Cir. 1982), entered the same day as the second opinion of the Sixth Circuit in this case and deciding the same issue in six consolidated habeas corpus cases, is set forth in the Appendix at pp. A107-A129. The six opinions of the District Courts in the habeas corpus cases reviewed by the Sixth Circuit in its consolidated decision in Turoso, et al. v. Cleveland Municipal Court, et al., supra, five of

which are unreported and one of which is reported at 531 F.Supp. 829 (N.D. Ohio 1980), are set forth in the Appendix at pp. A130-212. The opinion of the Ohio Supreme Court in State v. Burgun, 56 Ohio St.2d 354 (1978), referred to in both opinions rendered by the Sixth Circuit in this case, is set forth in the Appendix at pp. A213-A245.

JURISDICTION TO REVIEW

The date of the opinion and order of the Court of Appeals sought to be reviewed is February 4, 1982, wherein the Ohio Obscenity Statute was upheld.

The petitions of Sovereign News Company for rehearing and rehearing en banc were denied on March 23, 1982. This Cross-Petition is filed pursuant to Rule 19.5, the Petition having been received on June 24, 1982, in order to preserve these abstention issues in the event

review is granted to the Petition of Sovereign News Company.

Jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

PROVISIONS OF LAW INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix at pp. A247-A250. Title 28, Section 1331 of the United States Code is set forth in the Appendix at pp. A251-A252. Title 28, Sections 1343 and 2201 of the United States Code and Title 42 Section 1983 of the United States Code, as those statutes were worded at the time of the filing of the complaint in this case, are set forth in the Appendix at pp. A253-A256. Ohio Revised Code Sections 2907.01 and 2907.32 are set forth in the Appendix at pp. A257-A265.

STATEMENT OF THE CASE

On February 4, 1982, the United States Court of Appeals for the Sixth Circuit concluded five years of challenge to the Ohio Obscenity Statutes by upholding the Ohio law, as construed by the Ohio Supreme Court in 1978, in the second appeal in this case brought by Sovereign News Company against the prosecuting attorneys and police officers from Cuyahoga and Montgomery Counties. The Court of Appeals also decided on February 4, 1982, that the law was not only constitutional as construed but as applied to several habeas corpus petitioners who had been convicted in the Cleveland Municipal Court. This case, Turoso, et al. v. Cleveland Municipal Court, et al., 674 F.2d 486 (6th Cir. 1982) (Appendix at pp. A107-A129), is also the subject of a Petition for a Writ

of Certiorari filed on June 9, 1982, Case No. 81-2266.

The defendants to the instant civil action brought by Sovereign News Company in 1977, including Roy Warner, et al., Cleveland Police Officers, raised abstention as an issue in the District Court and in the two appeals to the Court of Appeals. The District Court denied the abstention claims specifically in its first opinion, Sovereign News Company v. Lee C. Falke, et al. ("Sovereign I"), 448 F.Supp. 306 (N.D. Ohio E.D. 1977). The Court of Appeals in its first opinion remanded the case for reconsideration of the statutory issues without reference to the abstention claims. Sovereign News Company v. John T. Corrigan, et al., 610 F.2d 428 (6th Cir. 1979) (Appendix at pp. A93-A96). The second opinions of the District Court and the Court of Appeals ruled on the merits of the statutory

issue without reference to the abstention claims. Sovereign News Company v. Lee C. Falke, et al., (unreported) (N.D. Ohio E.D., Sept. 19, 1980) (Appendix at pp. A6-A90) ("Sovereign II"); Sovereign News Co. v. Falke, et al., Defendants, Roy Warner, et al., Defendants-Appellants, 674 F.2d 484 (6th Cir. 1982) (Appendix at pp. A1-A5).

These Cross-Petitioners, Cleveland Police Officers who are defendants in the District Court, wish to preserve the abstention issues in this Court in the event review is granted to the Petition of Sovereign News Company concerning the validity of the Ohio Obscenity Statute as construed by the Ohio Supreme Court and lower Ohio trial and appellate courts. Had abstention been ordered by the District Court in 1977, this appellate litigation would not have taken place. Further, and importantly, abstention

would prevent these defendants from proceeding to trial on the allegations of the Sovereign News Company that the police officers violated its civil rights in executing a search warrant at its Cleveland warehouse and seizing allegedly obscene magazines and records regarding those magazines for use in a criminal action in Montgomery County Common Pleas Court in Dayton.

REASONS FOR GRANTING THE WRIT

This Cross-Petition presents abstention issues which have never been considered by this Court and decided on the merits. Though this case involves a challenge to a state's obscenity code, the principles would apply to most criminal cases. These questions would also eliminate a great deal of unnecessary federal interference lawsuits. First, is a search warrant enough of a "pending state proceeding" to

trigger Younger abstention? Second, must a federal court, under Pullman, await the state court ruling of an appeal which is then presently considering the same statute which is challenged in federal court?

Ohio should have been a particularly appropriate state for abstention under the facts of this obscenity case. There is a history of judicial construction of Ohio obscenity law by Ohio courts to adopt the latest "tests" for obscenity announced by this Court. The Ohio statutes have continually been subject to judicial review and construction as federal constitutional standards have changed. Many Ohio decisions have specifically limited obscenity in Ohio to sexual conduct rather than mere nudity and have announced applicable standards even before the decisions of this Court have recognized such concepts as

"community standards", "taken as a whole", "patently offensive", and "value". (See discussion of Ohio case law in the Briefs in Opposition to the Petitions for Writs of Certiorari in this case and the companion habeas corpus case; Sovereign News Company v. Corrigan, No. 81-2326, and Turoso v. Cleveland Municipal Court, No. 81-2266.

The federal interference represented by this lawsuit and the District Court's opinions have been severe. Though it is too late to prevent the interruption with the obscenity prosecutions of the City of Cleveland, which has existed for over five years, this Court can prevent further delay and interference with enforcement of Ohio obscenity law pursuant to the mandates of the Supreme Court of Ohio, as well as prevent the criminal laws of other states from being litigated in federal court when a state

search warrant has been issued or when the state courts are considering the same legal issues in their appellate courts.

This case presents adequate example for the continuing need for this Court to review, if only by certiorari, the unusual case presenting extraordinary situations proving the pervasive impact which a federal court injunction and declaratory judgment has on a state criminal justice system. This is such a case needing this Court's attention. This Court has jurisdiction to consider all of the substantial federal questions determined in the earlier stages of this litigation. Reece v. Georgia, 350 U.S. 85, 87 (1955); Mercer v. Theriot, 377 U.S. 152, 153 (1964). This Court should reach back to the District Court opinion and decide the abstention and statutory validity questions in favor of these police officers.

For these reasons, this Court should grant the Cross-Petition to review these novel abstention claims if it chooses to review the obscenity statute claims in the Petition of Sovereign News Company.

LAW AND ARGUMENT

I. THE PENDENCY OF A STATE COURT SEARCH WARRANT PROCEEDING REQUIRED ABSTENTION UNDER YOUNGER FROM FEDERAL CLAIMS OF UNCONSTITUTIONALLY OF STATE STATUTES, INVALIDITY OF STATE SEARCH WARRANT, AND UNREASONABLE SEARCH UNDER STATE SEARCH WARRANT UNLESS CLAIMANT PRESENTED THESE QUESTIONS FIRST TO STATE JUDGE WHO ISSUED THE SEARCH WARRANT.

As the record indicates, and as alleged in the original Complaint filed in the District Court by plaintiff below, the Dayton Police Officers applied for a search warrant before Judge Leo M. Spellacy of the Common Pleas Court for Cuyahoga County, Ohio, seeking permission for the two Dayton Officers and the Cleveland Police Officers to search the Sovereign News Company pornography

warehouse in Cleveland. Under Ohio law, the Cleveland Police were necessary parties to the execution of the warrant because Dayton Police cannot execute a search warrant in Cuyahoga County. State v. Harrison, 20 Ohio Misc. 282, 285-88, 251 N.E.2d 521, 48 Ohio Ops.2d 344 (Montgomery County Common Pleas, 1969).

Under traditional Younger-Huffman abstention principles, the federal courts should abstain from considering federal constitutional claims in the face of a pending state proceeding. The District Court held, in "Sovereign I", that abstention is triggered by indictment or at least the taking of testimony by a state grand jury. 448 F.Supp., at 329-31, 331-72. However, this ruling was erroneous and abstention is appropriate where there has already begun a state search warrant proceeding which provides an opportunity under state law for the

subject of the search to contest the validity of statutes and process, attack the validity of the search warrant, and seek suppression and return of the seized property before the state court which issued the search warrant.

Ohio courts have long recognized the right of a person who had been searched under a search warrant to apply for return and suppression of the property. Kovacs v. State of Ohio, 24 N.P. (N.S.) 1 (Montgomery County Common Pleas, 1921); Heppel v. Columbus, 106 Ohio St. 107, 140 N.E. 169, 171 (1922). As discussed in Kovacs, supra at 11, inadmissible evidence seized under an illegal search warrant may be challenged anytime before trial "in a collateral proceeding, by application . . . no rule of procedure excludes the making of such an application in this state". It is clear that even absent specific rule or

statute, a court has the inherent power to reconsider the legality of a warrant and to review the lawfulness of its execution.

Under Ohio law, the complaining party may attack both the search warrant and its manner of execution even before entering a plea or facing arrest. State of Ohio v. Vuin, 185 N.E.2d 506, 508 (Summit County Common Pleas, 1962).

The Sovereign News Company, or any of its employees, could and should have applied to the Cuyahoga County Court of Common Pleas for an order declaring the Search Warrant invalid, or to order the search unlawful as exceeding the authorized scope of the Warrant, or for return of the property seized or for all of these remedies.

Those wishing to contest the validity of an Ohio statute, or almost any legal controversy, may also avail

themselves of the Declaratory Judgments Act of Ohio Revised Code Chapter 2721. Burger Brewing Co. v. Liquor Comm., 34 Ohio St.2d 93, 96, 63 Ohio Ops.2d 149, 296 N.E.2d 261, 264 (1973); Moss v. Columbus Bd. of Ed., 55 Ohio Misc. 7, 9 Ohio Ops.3d 244, 379 N.E.2d 275 (Franklin County Common Pleas, 1978).

As was done in United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962), this Court should hold that the Sovereign News Company should have filed a request for relief under the Ohio Declaratory Judgment statutes. In United Gas, supra at 135-36, an interpretation of state law was made in federal court "in advance of construction of the License Code by the courts of the State, which alone, of course, can define its authoritative meaning". This Court saw a potential conflict between the federal ruling and that which could be

forthcoming from the Alabama Supreme Court, and continued at page 135:

> The availability of appropriate declaratory judgment proceedings under Ala. Code . . . avoids this unsatisfactory dilemma.

The Ohio Declaratory Judgment statutes have always been liberally construed. Sessions v. Skelton, 163 Ohio St. 409, 56 Ohio Ops. 370, 127 N.E.2d 378 (1955). The remedies are limited only by the subject matter jurisdiction of the court and include equitable relief where applicable. State, ex rel. Foreman v. Municipal Court, 12 Ohio St.2d 26, 41 Ohio Ops.2d 159, 231 N.E.2d 70 (1967). The purpose of these statutes is to provide immediate and alternative remedies for the solution of legal rights, even where an action has not yet begun or a cause of action occurred, or where legal rights exist but must await some act by another before the right of

action is normally asserted. Murray v. McCrystal, 99 App. 441, 59 Ohio Ops. 194, 134 N.E.2d 88 (Erie County, 1955); Herrick v. Kosydar, 44 Ohio St.2d 128, 130, 73 Ohio Ops.2d 442, 339 N.E.2d 626, 627 (1975).

The federal plaintiff below could have raised all these claims in the Common Pleas Court and the opportunity to do so following a search warrant should be recognized by this Court as a critical stage for abstention purposes. See: Harmar Theatres v. Cryan, 393 F.Supp. 34, at 39 n.2 (D.N.J. 1975).

This Court has recognized that state proceedings which are antecedent or ancillary to criminal process are entitled to deference by abstention. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Colorado River Dist. v. U.S., 424 U.S. 800, 816 (1976). As stated in Huffman, supra at 604:

> The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials.

The District Court in Hamar Theatres, supra at 39, footnote 2, noted that the state search warrant proceedings were, like the nuisance action in Huffman, both in rem actions. The Florida federal court held that traditional Younger principles were enough to require abstention, but went on to note:

> Thus, even if the issuance of the search warrant were viewed as the commencement of that sort of state judicial proceeding, against Hamar or its property, to which Younger standards are made applicable by Huffman, this Court would merely be afforded a second basis upon which to reach the same result.

The situation present in this Sovereign News case was sufficient for

the District Court to order the Plaintiff to return to the search warrant proceeding in Cuyahoga County to present its claims, and should have abstained from any claims as to the authorities in Cuyahoga County.

This Court recently reaffirmed its strong position on Federal abstention in Moore v. Simms, 442 U.S. 415, 60 L.Ed.2d 994, at 1007 (1979):

> In sum, the only pertinent inquiry is whether the proceedings afford an adequate opportunity to raise the constitutional claims, and the Texas law appears to raise no procedural barriers.

This is a question not yet decided by this Court. It is one which would set a clear limit on when state proceedings were worthy of federal deference and recognize the right and ability of state courts to determine statutory claims.

II. THE PENDENCY OF APPEAL IN STATE SUPREME COURT OF THE INTERMEDIATE STATE APPELLATE COURT DECISION UPON WHICH FEDERAL DISTRICT COURT RELIED IN FINDING STATE STATUTE UNCONSTITUTIONAL REQUIRED ABSTENTION UNDER PULLMAN UNTIL STATE SUPREME COURT CONSIDERED OR CONSTRUED THAT STATE STATUTE.

The District Court relied upon an unreported decision of the Cuyahoga County Court of Appeals to find that no Miller construction had been placed on the Ohio obscenity statute. That decision affirmed the misdemeanor Cleveland conviction of Ronald Burgun and was announced on August 18, 1977, which was after the hearing on the Preliminary Injunction in the District Court on March 29-31, 1977, but before the District Court's opinion of October 31, 1977 ("Sovereign I"). However, Ronald Burgun filed his jurisdictional papers in the Ohio Supreme Court on October 6, 1977, and was represented by the same law firm which represents the Sovereign News

Company in this case. On December 1, 1977, the Ohio Supreme Court granted the Motion to Certify to review, among several search and seizure and evidence questions, the constitutionality of the Ohio definition of obscenity.

Under the Pullman Abstention Doctrine, the federal courts should abstain from premature rulings on state laws while the state supreme court was presented the opportunity to hear the matter and construe the statute to avoid constitutional conflict. See: Railroad Commission v. Pullman, 312 U.S. 496 (1941); Albertson v. Millard, 345 U.S. 242 (1953); Hicks v. Miranda, 442 U.S. 332 (1975); Moore v. Simms, supra; Muskegon Theatres v. City of Muskegon, 507 F.2d 199 (6th Cir. (1974). But see opinion of the District Court, 448 F.Supp., at 380-90.

A clearer case for Pullman style abstention could not be found than a federal court awaiting the Ohio Supreme Court's review of the very case which the District Court declares as the proof of the need for and lack of an authoritative state court construction of the obscenity statute. (See opinion of District Court, 448 F.Supp., at 401-03.) This United States Supreme Court specifically invited state supreme courts to "Millerize" their existing statutes and Ohio's Supreme Court was entitled to that opportunity. See: Miller v. California, 413 U.S. 15, 24-25 (1973) and Ward v. Illinois, 431 U.S. 767 (1977).

The District Court's reliance upon the intervening unreported opinion of the County Court of Appeals points out the need for clarification from this Court of the need for "Pullman Abstention" while that case is still on appeal. In fact,

the defendant in that case, Ronald Burgun, had already filed his Notice of Appeal to, and the Memorandum of Jurisdiction in, the Ohio Supreme Court on October 6, 1977. These facts, and the immediate ruling that would have been expected by the Ohio Supreme Court on whether it would hear Ronald Burgun's appeal, were completely ignored by the District Court. The abstention groundwork necessary under Railroad Comm. v. Pullman, supra, was already underway and the Court should have certainly abstained for at least that brief period.

The cases the District Court relied upon to refuse "Pullman Abstention" are not applicable to this obscenity case. The District Court, 448 F.Supp., at 382-83, looked to Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964); Zwickler v. Koota, 389 U.S. 241, 251-52 (1967); and Procunier v. Martinez, 416 U.S. 396,

401-04 (1974), as authority for the inapplicability of Pullman and of this "Court's repeated reluctance to apply Pullman to pure expression First Amendment litigation". (Id., 448 F.Supp., at 384.) This is an opposite reading of this Court's holdings. Specifically because this is an obscenity case, Pullman is particularly appropriate. The cases relied upon by the District Court are political speech cases, not sexual exploitation cases. This Court has "pre-empted the field" of obscenity definition since Roth, and there lies the great distinction between obscenity statute consideration and political or economic expression cases. This Court has mandated a national constitutional test for obscenity and specifically invited state courts to construe old statutes to adopt it by interpretation. Miller, supra at 24 n.6,

25; Ward, supra. Therefore, federal courts should be extra careful to allow this process to proceed uninterrupted in the state system.

It may appear futile to complain after over five years that the District Court should have waited a few more weeks. However, the issue is important to state criminal justice systems having the duty of enforcing their laws. Freedom from unwarranted federal interference is an essential concept of our republican system of sovereignties and any attempt, successful or otherwise, to infringe on legitimate state functions must be rectified no matter how long after major damage is accomplished.

The recent case of Moore v. Sims, 442 U.S. 415, 60 L.Ed.2d 994 (1979), also points to the continuing adherence to strict abstention principles as mandated by this Court. In the majority opinions

this Court repeated, in strong and unequivocal terms, that federal courts should refrain from interfering with state cases. The Court, at 442 U.S. 423, restated the vitality of Younger-Huffman:

> As was the case in Huffman, the State here was a party to the state proceedings . . . "in aid of and closely related to criminal statutes." Id., at 604. The existence of these conditions, or the presence of such other vital concerns as enforcement of contempt proceedings, Juidice v. Vail, 430 U.S. 327 (1977), or the vindication of "important state policies such as safeguarding the fiscal integrity of [public assistance] programs," Trainor v. Hernandez, 431 U.S. 434, 444 (1977), determines the applicability of Younger-Huffman principles as a bar to the institution of a later federal action.

This Court then repeated the basic equitable abstention factors which, we submit, were not appropriately followed by the District Court below. As stated at 442 U.S., 425-26:

> Under the established principles of equity, the exercise of equitable powers is inappropriate if there is an adequate remedy at law. . . . Restated in the abstention context, the federal court should not exert jurisdiction if the plaintiffs "had an opportunity to present their federal claims in the state proceedings." [Emphasis the Court's] . . . Certainly abstention is appropriate unless state law clearly bars the interposition of the constitutional claims.

It was also made clear in Moore v. Sims, supra, that a broad attack on a statute does not ease abstention requirements, but that the opposite is true in light of the state court's duty to interpret its own laws. As stated at 442 U.S., 427:

> Thus the District Court suggests that the more sweeping the challenge the more inappropriate is abstention, and thereby inverts traditional abstention reasoning. The breadth of a challenge to a complex state statutory scheme has traditionally militated in favor of abstention, not against it. This is evident in

> a number of distinct but related lines of abstention cases which, although articulated in different ways, reflect the same sensitivity to the primacy of the State in the interpretation and subsequent invalidation of part of an integrated statutory framework.

This Court finally touched on three considerations, all of which are particularly applicable to this appeal. As stated at 442 U.S., 428-30:

> There is first the Pullman concern: that a federal court will be forced to interpret state law without the benefit of state court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time--thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless. . . .
>
> The second consideration is the need for a concrete case or controversy--a concern obviously enhanced by the scope of the challenge. . . . Yet no proceeding was pursued in this case to the point where the standard could be applied and

> consequently appellees can point to no injury in fact. . . .
>
> The final concern prompted by broad attacks on state statutes is the threat to our federal system of government posed by "the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." . . . Almost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interest. When federal courts disrupt that process of mediation while interjecting themselves is such disputes, they prevent the informed evolution of state policy by state tribunals. . . . The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims--a postulate we have repeatedly and emphatically rejected. . . .

This Court should now announce a rule that federal courts should not decide the validity of state laws which

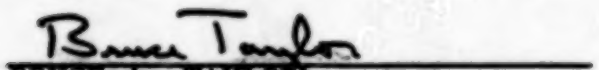
are pending consideration in ongoing state appeals, even though the instant federal plaintiff is not a direct party to that appeal. The District Court pointed to the County Court of Appeals decision as proof that the Ohio statute was not yet authoritatively construed in light of Miller. These Police Officers alleged at the March, 1977, hearing before the District Court that Miller's guidelines were to be considered part of the Ohio definitions, as mandated by the Cuyahoga County Court of Appeals in the 1976 decision of State v. Dalene Burgun, supra, 49 Ohio App. 112. The City of Cleveland put forth this position in the Supreme Court of Ohio in filing a Petition for Confession of Error in the Ronald Burgun appeal, and the District Court should not have assumed otherwise after the hearing without giving these defendants an opportunity to be heard.

The Supreme Court of Ohio proved the wisdom of this proposal for abstention in ultimately clarifying the law. The decision in State v. Ronald Burgun, supra, 56 Ohio St.2d 354, 356-61, 384 N.E.2d 255, 258-61 (1978), no appeal of right taken to U.S. Supreme Court (copy in Appendix at pp. A213), avoided the constitutional problems raised by the District Court. Had the District Court awaited this decision, under Pullman, these years of needless interference with Ohio obscenity law would have been avoided.

CONCLUSION

These abstention principles have not been followed in the courts below and are important considerations for these parties as well as general state-federal court relations. This Court should consider these abstention issues along with any consideration on the merits of the validity of Ohio's obscenity statutes.

Respectfully submitted,



BRUCE A. TAYLOR
Attorney for Cross-Petitioners

CERTIFICATE OF SERVICE

Three copies of the foregoing Cross-Petition for a Writ of Certiorari were properly mailed to each of the following counsel on July 24, 1982.

Bernard A. Berkman, Esq.
J. Michael Murray, Esq.
Berkman, Gordon, Murray and Palda
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44112 (216) 781-5245
Attorneys for Sovereign News Company

James A. Brogan, Esq.
First Assistant Prosecuting Attorney
Montgomery County Courts Building
41 North Perry Street
Dayton, Ohio 45402 (513) 228-5126
Attorney for Lee C. Falke, E. R. Robinson, and C. L. Dalrymple

Thomas P. Gill, Esq.
Assistant Prosecuting Attorney
Cuyahoga County Justice Center
Courts Tower, Ninth Floor
1300 Ontario Street
Cleveland, Ohio 44113 (216) 623-7790
Attorney for John T. Corrigan

Thomas V. Martin, Esq.
Assistant Attorney General of Ohio
State Office Tower, 17th Floor
30 East Broad Street
Columbus, Ohio 43215 (614) 466-8240
Attorney for Amicus Curiae

Bruce Taylor
BRUCE A. TAYLOR
Attorney for Cross-Petitioners